In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 73-1888

UNITED STATES OF AMERICA, *Petitioner*

vs.

STATE OF ALASKA, *Respondent*

PETITION FOR REHEARING

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The Majority Opinion in this case is so important, so devastating, and, in our opinion, so unfair to the State of Alaska, that we deem it appropriate to file this short Petition for Rehearing. Undoubtedly, through our own inability as counsel for the State of Alaska, we have been unsuccessful in getting the Majority of this Court to focus upon the real issues. The Majority Opinion, we respectfully submit, does not come to grips with the basic issues and, indeed, goes beyond even that position heretofore urged by the Federal Government in the courts below. Further, the Majority Opinion has made complex that which heretofore all the parties regarded as simple. For instance, the Federal Government agreed, as indeed it had no alternative otherwise, with the 109 Fact Find-

ings made by the District Judge. These extensive factual findings which heretofore this Court recognized as crucial in Louisiana[1] have now been ignored by this Court. So far as the law was concerned, Alaska did not differ significantly with the Federal Government's contentions in this Court and in the lower courts. Under these circumstances, it is pertinent to ask: How did the Majority, disregarding the position of both parties, come to the conclusion it did? In the subsequent portions of this petition we shall respectfully endeavor to point out where we believe the Majority overlooked material matters of law and fact. Had the Majority considered those factors, the result would have been different.

As this Court and both parties recognized, we are dealing with the concept of historic inland waters. The first requirement, agreed to by all of the international law authorities, is the necessity for the exercise of sovereignty over the water in question by the claiming nation. How can this sovereignty best be asserted by municipal act? Remembering that we are dealing with history and with past events, we respectfully point out that the only significant way that sovereignty could be claimed over water was to claim the exclusive right to fish therein. There was no petroleum development carried on in these waters and any such notion, until very recent years, that oil wells would penetrate the crust of the soil beneath the sea was as

[1] In *Louisiana* this Court recognized that the issues upon which an historic claim rests are principally factual, the resolution of which will be left to the trier of fact. In this case, of course, the District Court dealt extensively and carefully with the facts, 394 U.S. 11, 75 (1969).

foreign to international thinking as trips to the moon. The control of navigation of certain waters, Alaska admits, was never sufficient to establish a claim of sovereignty over inland waters. But every international authority has recognized that the exercise of jurisdiction over waters for fishery purposes comprised the requisite claim of sovereignty.[2] Otherwise, as a practical matter, there could be no historic inland bay.

Even the Federal Government here did not seriously contest the simple proposition asserted above, that the exercise of sovereignty by the exclusive control of fisheries was sufficient. What the Federal Government did claim was that there had been no such claim. When the State of Alaska was able to point out the clarity of the regulations under The White Act, visibly enforced by United States patrols over a period of more than thirty years, the Federal Government had no answers to our position either in this Court or in the courts below. And in fact this Court, in its Majority Opinion, has accepted Alaska's position.

Having found the crucial requirement of exclusive sovereignty, the Court ignored the findings by the District Court that foreign nations had been aware for years of the exercise of U.S. dominion over Cook Inlet.[3] In dealing with the issue of acquiescence by

[2]See *Juridical Regime*, Paragraph 90 Cf. The Majority Opinion, pp. 11-12:

"The District Court, of course, was clearly correct insofar as it found that the United States had exercised jurisdiction over Cook Inlet during the territorial period for *the purpose of fish and wildlife management.*" (Emphasis the Court's).

[3]Findings 92-102, Pet. App.C. pp. 43a-45a, inclusive.

foreign nations, the Majority Opinion misconstrues or overlooks at least two crucial facts. First with respect to the Gharrett-Scudder line, the Opinion states at pp. 10-11:

> "The maps were forwarded by the Bureau of Fisheries to the State Department for transmittal to the Canadian delegation with express disclaimers that the line was not intended to bear a relationship to the territorial waters of the United States in a legal sense."

The inference the Opinion drew, of course, is that there was no such disclaimer transmitted to Canada. The evidence is to the contrary. The charts were transmitted to the Ministry of Fisheries, Canada, with no disclaimer (pp. 35-36, Alaska Brief). Moreover, the Majority Opinion overlooks the fact that the line was intended to depict a regulation which by its very terms defend the waters of Alaska in terms of the 3 mile limit, [50 CFR § 101.19 (1957)]. In addition, the Court failed to recognize that Canada accepted the Gharrett-Scudder line to Cook Inlet without protest.

Secondly, the Court in noting the fact of the Japanese protest in the Shelikof Strait incident, failed to apply the principle that one protest in face of continuing sovereignty is insufficient. The State of Alaska has continued its sovereignty over Cook Inlet without any attempt of the Japanese to fish therein and with no further protest. See *Juridical Regime,* Paragraphs 112-115. This further points out the crucial misapplication of law by the Majority—assertion of fisheries jurisdiction, recognized and unchallenged by foreign nations, is the equivalent of the

maturing of the historic claim to Cook Inlet as inland waters.[4]

And, lastly, there is the significant and glaring failure of the Majority to recognize the established principles of international law which even the Federal Government did not dispute. It is that if the claiming nation's assertion of sovereignty is so clear that foreign nations did not challenge it, this was sufficient to establish the second and third requirements for historic inland bays—continuity and acquiescence.[5]

CONCLUSION

Whether fairly or not, this and prior Supreme Courts have borne the brunt of criticism that the Court has increasingly tended toward a continuing Constitutional Convention or more particularly, a Legislative Body never dreamed of by our forefathers. We have attempted briefly to show some crucial misapplications of the law and facts by the Majority Opinion. We feel that in the areas discussed, the Majority Opinion is clearly subject to reconsideration, and upon such reconsideration, the result would change. As it now stands, the State clearly believes that there is no justification for the Majority Opinion except the conclusion that the Majority has decided to accept as a policy-making function the

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[4]The two nations having the greatest interest in the area, Canada and Japan, clearly did more than "fail to object" (Majority Opinion, p. 15). Cf. *Juridical Regime*, Paragraph 117: "It is obvious that, depending on the circumstances, the acquiesence of certain States must be of far greater weight and moment in establishing the existence of a prescriptive historic right than that of others."

[5]*Juridical Regime*, Paragraph 120.

notion that it is better for all of the citizens of the United States through the Federal Government to share in Alaska's oil than for Alaskan citizens to own it alone. Alaska was never given the opportunity to address itself to this issue. We, however, would make this final observation. There is more at stake here than the oil in Lower Cook Inlet. The Majority Opinion is a direct invitation to all foreign fishermen to enter the waters of Cook Inlet and to fish therein. Had Alaska been able, and given the opportunity to meet the policy issue at question, it would have had no difficulty in proving that which every fisherman in the world knows, to wit: that within a matter of just a few years and after only a few of the foreign fishing fleets have entered Cook Inlet, there will be no salmon, no halibut, no fisheries of any kind whatsoever for anyone to enjoy.

We earnestly and respectfully ask that the Majority of the Court reconsider its Opinion, grant rehearing herein and affirm the judgments of the lower courts.

Dated, July 15, 1975

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As one of counsel of record for the State of Alaska, respondent in the above-entitled and numbered cause, I certify that the attached Petition for Rehearing is presented in good faith and not for delay.

Charles K. Cranston